

**IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO**

THE STATE OF OHIO)	CASE NO. 92 CR 000517
)	
Plaintiff)	JUDGE EUGENE A. LUCCI
)	
vs.)	<u>ORDER UPON RECONSIDERATION</u>
)	<u>OF MOTION FOR LEAVE TO FILE</u>
LARRY M. SCHLEE)	<u>MOTION FOR NEW TRIAL;</u>
)	<u>NOTICE OF HEARING ON ISSUE OF</u>
Defendant)	<u>“UNAVOIDABLE PREVENTION”</u>

This matter came on for consideration upon the defendant’s Motion to Reconsider Ruling that Defendant’s Leave to File a Motion for New Trial is Moot; in the Alternative, Motion to Withdraw Motion for New Trial, filed February 28, 2002. This Court held a case conference on February 21, 2002, and it was the Court’s opinion at that time after consulting with counsel that the motion for leave to file a motion for new trial *instanter* was moot, because Judge Parks (previously assigned to this case) had already granted defendant leave in 1997 to file a motion for new trial, which was dismissed on procedural grounds. However, defendant has alleged that the 2002 motion for new trial is materially different and more extensive than the 1997 motion, as are the grounds known or contemplated in 1997, and defendant desires that his motion for leave be considered.

For the reasons set forth in this Order, the Court disagrees with the assertion that March 6, 2001, is a deadline of any sort for filing a motion for new trial in this case. Further, the Court disagrees with the proposition that the “motion for leave” to file the motion for new trial is the properly required motion under these circumstances. The Court considers the proper motion to be a “motion for leave to file delayed motion for new trial and request for a finding of unavoidable prevention.”

Because of the serious allegations involved in this matter, the Court will afford the parties adequate opportunity to be heard. Since this case has been procedurally convoluted, the Court herein sets forth its understanding of the rules and the law as they pertain to the pending motions.

Criminal Rule 33

Motions for a new trial of a criminal case are covered by Rule 33 of the Ohio Rules of Criminal Procedure.

Criminal Rule 33(A), relating to grounds for a new trial, provides, in part:

Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
(2) Misconduct of the . . . prosecuting attorney, or the witnesses for the state; ...
(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial . . .

Criminal Rule 33(B) provides, in part, that:

Application for a new trial . . . except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered . . . unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered . . . If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

Accordingly, if a delayed motion is authorized, Crim.R. 33(B) then provides that the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within fourteen days, or from discovering the evidence within 120 days, after the verdict.

In *Holmes v. United States* (4th Cir., 1960), 284 F.2d 716, the court stated that there are two types of newly discovered evidence: (1) evidence bearing upon the substantive issue of guilt;

and (2) evidence bearing upon the integrity of the trial. The federal court in that case applied a newly-discovered evidence rule to both types of newly discovered evidence, in part because there was no provision similar to Crim.R. 33(B) providing for a delayed motion for new trial upon the ground of later-discovered juror misconduct, which was the issue involved in *Holmes*.

Thus, the issue before the Court *sub judice* is whether the “unavoidably prevented” provision of Crim.R. 33(B) includes the inability of the defendant to ascertain the grounds for new trial within the regular fourteen-day period for filing a motion for new trial, or the inability of defendant to discover the new evidence upon which he must rely within the regular 120-day period for filing a motion for new trial. The Court notes that the grounds of prosecutorial or state witness misconduct are (or can be) related and intertwined with the ground of newly discovered evidence in this case, as alleged by defendant.

In any event, Criminal Rule 33(B) requires that this motion be filed within seven days of an order finding that defendant was unavoidably prevented from finding such evidence within the fourteen-day or 120-day period. No such order was filed in the seven days prior to the filing of the motion for new trial. Consequently, the defendant's motion for new trial is premature and not properly before the trial court.

Distinction Between Motion for New Trial and Post-Conviction Relief

Although the issue at hand is the granting of a new trial, defendant has also sought relief after judgment upon constitutional grounds by petition for post-conviction relief on two occasions, to no avail. The basic difference between a motion for new trial under Crim.R. 33 and a petition for relief after judgment pursuant to R.C. §2953.21 is that the latter must be predicated upon denial or infringement of constitutional rights so substantial as to render the judgment void or voidable. While such a basis may constitute justification for a new trial pursuant to Crim.R. 33, only prejudicial error need be demonstrated in support of a motion for new trial.

Unavoidably Prevented

A party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new

trial in the exercise of reasonable diligence. Here, the defendant alleges it is quite clear that the defendant could not reasonably have learned within fourteen days after the verdict of the existence of the alleged misconduct of the prosecutor and of the witnesses for the state which he now attempts to assert by way of a motion for new trial. Similarly, defendant alleges it is quite clear that the defendant could not reasonably have learned within 120 days after the verdict was rendered of the alleged newly discovered evidence which he now attempts to assert by way of his motion for new trial.

Clear and Convincing Evidence

Under Crim.R. 33(B), a defendant who wants to file a delayed motion for new trial must show “by clear and convincing proof” that he was unavoidably prevented from filing a timely motion.

In *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118, paragraph three of the syllabus, the Supreme Court stated:

Clear and convincing evidence is that measure or degree of proof which is more than a mere ‘preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. *State v. Smith* (Mar. 27, 1998), Miami App. No. 97 CA 46, unreported, p. 4, quoting from *Cross v. Ledford*.

Bifurcated Procedure

In this regard, Crim.R. 33(B) contemplates a bifurcated procedure: (1) a motion for leave to file a delayed motion for new trial supported by evidence demonstrating that the movant was unavoidably prevented from ascertaining the ground sought to be asserted by way of motion for new trial within fourteen days after the rendering of the verdict (in the case of grounds (A)(1) through (5)) or within 120 days after the day of the verdict (in the case of newly discovered evidence, ground (A)(6)); and (2) if the court finds that the movant was unavoidably prevented, then the delayed motion for new trial, filed within seven days of the court’s finding and properly supported by an affidavit demonstrating the existence of the grounds for the motion pursuant to Crim.R. 33(C).

Misconduct of the prosecuting attorney or witnesses for the state is particularly susceptible to nondiscovery within fourteen days after the verdict where the misconduct did not

consist of affirmative acts at trial but, instead, involve matters not occurring in open court and generally not known to either the court or counsel at the time of the occurrence. The prosecuting attorney and witness misconduct which is allegedly demonstrated in the affidavits and evidence presented in support of the motion for new trial could result in such prejudice as to necessitate the granting of a new trial, assuming that the matters set forth in the affidavits and evidence are proved as having occurred. The newly discovered evidence alleged by affidavit and evidence in support of the motion for new trial could result in prejudice that would necessitate the granting of a new trial, assuming that the statements and evidence set forth are proved. See *State v Walden* (1984), 19 Ohio App. 3d 141, where this procedure was held applicable to Crim. R. 33(B) provisions dealing with delayed motions for new trial with respect to Crim. R. 33(A) grounds other than newly discovered evidence.

Here, defendant did not file a motion for an order of the court finding that he was unavoidably prevented from filing the motion for new trial within the fourteen days after the verdict was rendered or within the 120 days after the verdict was rendered. Defendant did file a motion for leave to file a (delayed) motion for new trial. This Court, after consulting with the attorneys for the parties, opined that leave was moot, and consequently ordered the Clerk of Courts to accept the motion for new trial for filing. Since no such order finding unavoidable prevention was filed in the seven days prior to the filing of the defendant's motion for new trial, the defendant's motion is premature and not properly before the trial court and is subject to dismissal. *State v Kiraly* (1977), 56 Ohio App. 2d 37. See also, *State v Shepard* (1983), 13 Ohio App. 3d 117, 118, wherein the court noted that there was no evidence therein indicating that appellant had made "a motion for a court order to find he was 'unavoidably prevented' from discovering the evidence."

As noted in Judge Krenzler's concurring opinion in *Kiraly, supra*:

[T]he defendant may choose to file his new trial motion together with his motion applying for the court order finding unavoidable prevention. In any event, however, a motion for new trial on account of newly discovered evidence made after the 120 day time period is not properly before the trial court until the court has entered the requisite order. . . .

Criminal Rule 33 does not place a time restriction upon when motions applying for a court order finding unavoidable prevention may be made. Therefore, the appellant is not precluded from making such application by motion to the trial court at this time, obtaining the required order and filing his second motion for a new trial anew. (Emphasis added).

Although the motion for the new trial can properly be dismissed or withdrawn as requested in the alternative by defendant, defendant did file for an order of the trial court that he may file his motion for new trial. The Court can deem his motion for leave as one for a ruling that he was unavoidably prevented from the discovery of the new trial grounds and new evidence within the applicable fourteen and 120 day time limits. If such an order is entered, defendant may then file, within seven days, his new trial motion for ruling on its merits by the court.

Purpose for and Construction of the Rule

This Court's interpretation of Crim.R. 33(B) is guided by Crim.R. 1(B), which states:

Purpose and construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed and applied to secure the fair, impartial, speedy and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay.

See, also, R.C. §2901.04(B) (“[r]ules of criminal procedure . . . shall be construed so as to effect the fair, impartial, speedy and sure administration of justice”). Moreover, Crim.R. 57(B) notes that “[i]f no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with [the] rules of criminal procedure.”

Crim. R. 33(B) provides for finality and the “speedy and sure administration of justice” by strictly limiting the time in which a defendant may file a motion for a new trial. Unless the motion is made on the basis of newly discovered evidence, a criminal defendant has only fourteen days from the date of the verdict to file the motion. If a court finds that the defendant was unavoidably prevented from filing his motion for a new trial within a 120-day period on account of newly discovered evidence, the defendant must file a motion within seven days of the order finding that the defendant was so prevented. The trial court has no discretion to extend these time requirements – as to the fourteen and 120 day periods. See Crim.R. 45(B). However, Crim.R. 33 is silent as to when a motion asserting unavoidable prevention may be filed. Here, Crim.R. 57(B) is applicable, in the exercise of the Court's sound discretion.

In light of the purpose and construction of the criminal rules, and the scope of Crim.R. 33(B), this Court concludes that a trial court could lawfully require a defendant to file a motion for leave to file a motion for a new trial within a “reasonable time” after discovering the new evidence. See *State v. Stansberry* (Oct. 9, 1997), Cuyahoga App. No. 71004, unreported. If the defendant needs additional time to procure affidavits of witnesses to support the motion, the trial court, pursuant to Crim. R. 33(A)(6), may then postpone the hearing on the motion for a reasonable time. However, Crim.R. 33 does not place any time limit upon the filing a motion for new trial after the fourteen or 120 days. The only requirement is the showing of “unavoidable prevention.” The Court supposes that a “reasonable period of time” should be implied once sufficient or material grounds reasonably calculated to be successful have been ultimately discovered. This Court finds that for the reasons set forth in the motion, and especially defendant’s *pro se* and imprisoned status, and the alleged suppression of exculpatory evidence, this motion could be deemed filed within a reasonable period of time.

This Court desires to afford the parties an adequate hearing on the predicate issues of “unavoidable prevention” and “reasonable period of time” in filing the motion, prior to addressing, if at all, the merits of the motion for new trial.

Granting the Motion for New Trial

The Court understands that the following guidelines for granting a motion for a new trial have been enunciated by the Ohio Supreme Court, and would be applicable should this matter proceed to a hearing on the merits:

To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, and approved in *State v. Lewis* (1970), 22 Ohio St.2d 125, 258 N.E.2d 445.

The granting of a motion for a new trial is necessarily committed to the wise discretion of the trial court and a reviewing court cannot reverse that decision unless an abuse of discretion is demonstrated. *State v. Williams* (1975), 43 Ohio St.2d 88, 330 N.E.2d 891; *State v. Lopa* (1917), 96 Ohio St. 410, 117 N.E. 319.

The Court notes that, if uncontroverted and if believed, defendant's evidence in support of his motion for new trial may be sufficient to justify the granting of a new trial. Therefore, the Court declines to dismiss or deny the motion outright. The Court observes that the motion for new trial is adequately documented with affidavits, and the Court has considered such evidence in granting the hearing on the issue of filing this delayed motion for new trial.

Conclusion and Ruling

The Court hereby shall consider the defendant's motion for leave to file motion for new trial, filed on January 30, 2002, as a motion for order finding "unavoidable prevention" of filing the motion for new trial and/or from discovering the new evidence, within 14 and 120 days, respectively, after verdict. Although the motion for new trial is not properly before the Court until such finding is made, in the event such finding is made by the Court, in the interest of judicial economy, the motion for new trial will be deemed filed on that date without the necessity of defendant filing an identical voluminous motion within seven days after the order finding unavoidable prevention. The state will not be prejudiced thereby, as it will have had the motion itself since February 21, 2002. The Court deems it wasteful and unnecessary to require defendant to withdraw his motion for new trial, only to file a new motion for order finding unavoidable prevention and the anticipated refiling of the same voluminous motion for new trial.

Accordingly, the Court will address compliance with Criminal Rule 33(B), relating to "misconduct of the prosecuting attorney or witnesses for the state" more than 14 days after verdict, and "newly discovered evidence" more than 120 days after verdict, *i.e.*, a finding that defendant was unavoidably prevented from the discovery within such periods, first, with an oral hearing – this being the predicate issue; and if such finding is in favor of the defendant, the Court will consider the motion for new trial on its merits at a second hearing. If the parties desire, the two hearings may be scheduled on the same day, as there may be testimony from the same witnesses at both hearings, as well as an overlapping of many evidentiary issues, in the interest of economy.

The Court hereby sets the predicate issue hearing for **THURSDAY, APRIL 18, 2002, AT 9:00 A.M.** If both parties agree to have the Court hear the merits of the motion for new trial

immediately following the predicate hearing (in the event the predicate finding is made), they should advise the Court not later than two weeks before the hearing date.

The parties shall adhere to the briefing requirements set forth in the February 21, 2002, order or may file other briefs or requests as they deem appropriate, including briefs or requests concerning any procedural issues, and the defendant shall be conveyed from prison to Lake County for the hearing.

To the extent that this order conflicts with the prior order of this Court issued on February 21, 2002, this order supersedes and governs.

IT IS SO ORDERED.

JUDGE EUGENE A. LUCCI

c: Vincent A. Culotta, Esq., Chief Assistant Lake County Prosecuting Attorney
Vanessa R. Clapp, Esq., Assistant Lake County Public Defender